UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

GEORGE R. CHAMBERLAIN, d/b/a CASCO BAY DIESEL,	)	
Plaintiff	)	
v.	)	***Docket No. 01-73-P-DMC***
F/V LADY MARIA,[1] et al.,	)	
Defendants	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW[2]

A bench trial in this matter was held before me on December 12, 2001. Counsel for the parties submitted case law in support of their respective positions on December 14, 2001. I now make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The plaintiff, George Robert Chamberlain, is a diesel mechanic operating a business known as Casco Bay Diesel in Windham, Maine. The business works primarily on marine engines, diesel trucks and generators.

[1] Although the F/V Lady Maria was initially the subject of an order authorizing arrest in this action, Docket No. 6, she was released from the warrant of arrest upon the posting of a bond, Docket No. 10, and that security was subsequently waived by stipulation, Docket No. 20. At this point, the corporate defendant rather than the vessel appears to be the real party in interest in this action. All references herein to the defendant are to the corporate defendant.

[2] Pursuant to 28 U.S.C. § 636(c), the parties have consented to have United States Magistrate Judge David M. Cohen conduct all proceedings in this case, including trial, and to order entry of judgment.

2. Defendant F/V Lady Maria is a fishing vessel operating out of Portland, Maine. Defendant F/V Lady Maria, Inc. is a corporation with a principal place of business in New Jersey. Thomas Joseph Roth is the captain of the F/V Lady Maria.

3. On June 16, 2000, a Friday, the generator on the F/V Lady Maria broke down. Roth called Maine Marine Diesel and was told that they could not work on the generator for two to three weeks. Shortly after making this call, Roth ran into Galen, a mechanic who worked for the plaintiff, on the dock. He asked Galen if he could repair the generator's engine. Galen looked at the engine and said that the repair would be "no real big job."

4. After consulting with the plaintiff, Galen returned the following Monday and took the engine out of the vessel within two hours. Roth asked for a "ballpark figure" on the cost of the repair and Galen said "around $3,000." Galen also said that the job would take seven to ten days.

5. Roth first spoke with the plaintiff after the engine had been taken out. The plaintiff estimated that the repairs would take one to two weeks. Roth told the plaintiff that he wanted the engine repaired as soon as possible.

6. When the engine was torn down at the plaintiff's shop, the plaintiff observed that the oil filter was full of metal and knew that the problem was severe. A lack of lubrication had caused the seizure of one piston and severe damage to a rod joint.

7. Roth told the plaintiff that he had been experiencing a number of automatic engine shutdowns and that, in order to avoid them, he tied the generator's regulator open so as to keep the generator running. This caused the engine to fail. A major overhaul was required.

8. On June 19, 2000 Roth signed a work authorization form brought to him by Galen to "remove, overhaul and install gen set." Plaintiff's Exhibit 9.

9. At the time, the F/V Lady Maria was engaged in long line fishing, for which she had an 88-day federal permit. The "days" could be used after May 1, and Roth had planned to use the vessel's full allotment as quickly as possible over the summer so that he could then refit the vessel and begin using it for lobstering.

10. The plaintiff sent the block and crankshaft from the engine to a machine shop, Thurzco Automotive & Industrial Machine, for machining of the crankshaft, replacing of the sleeves and rebuilding of the cylinder head.

11. The engine was built by Northern Lights. The plaintiff was aware that he could get parts for a Northern Lights engine from Billings Diesel & Marine Service, Inc. in Stonington, Maine, but he called Northern Lights directly in hopes of finding a dealer closer to Windham. Northern Lights directed him to order parts through its dealer Billings.

12. It took Billings two or three days to get the plaintiff the information he needed about the appropriate parts. The engine did not have any labels. The plaintiff had trouble determining what model the engine was. It was a Toyota model M30C, which is not common in this area. Billings had to do some research on the engine. The plaintiff called Billings daily and spoke with Roth two or three times a day. After a few days, the plaintiff received a list of parts and prices from Billings.

13. The plaintiff ordered parts from Billings as soon as he knew the size of the bearings involved. He had to wait until the crankshaft was inspected at Thurzco.

14. Billings placed orders with Alaska Marine, a distributor of parts for Northern Lights engines, for parts for the overhaul at issue on June 27, 28 and 30, 2000. All of the parts were ordered for delivery by next-day air from Seattle. Billings determined that Alaska Marine's outlet in Woburn, Massachusetts did not have the necessary parts in stock. Billings also ordered from Alaska Marine on July 6, 2000 a raw water pump repair kit for use on the F/V Lady Maria job.

15. Availability of parts was not an issue for Billings. There was a problem with identification of the main bearings. A mark on the engine block had to be matched with marks on the bearings. The wrong main bearings were shipped.

16. The plaintiff first told Roth that he was having problems getting the necessary parts two or three days after starting the job. The parts arrived at the plaintiff's shop one to one and one-half weeks after they were ordered.

17. The plaintiff told Roth that the parts would cost approximately $3,200. Roth, who testified that he thought that this was the charge for the whole job, responded that the plaintiff was to do whatever he had to do to get the parts in. The plaintiff asked Roth to pay for the parts up front. Roth gave the plaintiff a credit card number, which the plaintiff's bookkeeper ran through the business's credit card machine on July 5, 2000. In early August, 2000 the bookkeeper discovered that there was a problem with the machine and that the charge had not gone through. She was unable to recharge to the credit card number.

18. The receipt of incorrect main and rod bearings from Billings made it impossible for the plaintiff to work on the engine. The plaintiff returned the bearings to Billings and received a second shipment of bearings. The rod bearings were correct but the main bearings were not. It took two and one-half to three weeks to get all of the correct parts. Eventually the plaintiff decided to use the existing main bearings that were in the engine when it was torn down, because it was eventually determined that they were in good condition.

19. During the first week of July, Roth and the plaintiff discussed the possibility that Roth could buy a new engine. Roth told the plaintiff to continue working on the overhaul because he did not want to pay for a new engine on top of the cost of the work already done by the plaintiff.

20. The plaintiff's business completed work on the engine and Galen installed it in the vessel on July 18, 2000. The plaintiff inspected the engine after it was installed and it "ran fine." The customer said that it was a "good job."

21. The plaintiff's business also rebuilt the raw water pump that was attached to the engine. When the engine had been installed on the vessel, no water came out of the vessel's exhaust the first two times attempts were made to start it. The raw water pump was discovered to have been installed upside down. When this was corrected, the engine worked appropriately. However, it shut down about one hour after it was started. This pattern of shutting down continued, and Roth called the plaintiff's business to report this. Galen came to the vessel the next day but was unable to fix the problem. The plaintiff then went to check out the malfunction which was in the oil pressure gauge or alarm. He did not have a wiring diagram and could not fix the problem without one. Roth then called a service person from Maine Marine Diesel who replaced a bad electrical relay, thereby solving the problem.

22. The plaintiff marks up the cost of parts that he obtains for overhaul jobs by 35%. He marks up the cost of machine shop work by the same amount. The markup for parts is standard in his business. Billings also marked up the cost that it was billed for the parts by Alaska Diesel. The plaintiff did not inform Roth in advance that these markups would be included in his bill.

23. Roth took the vessel out to fish on July 23, 2000. Four days later the generator started shutting down. Roth then returned to port two days earlier than he had planned. He discovered that an electrical board had to be replaced. The defective electrical board was the reason why the generator had shut down in the first place.

24. In October, after two more fishing trips during which the generator "never sounded right" to Roth, the generator started losing water. Roth called the plaintiff and asked him to fix the leak. The plaintiff responded that he would not do warranty work until he had been paid for the repair work.

25. On the following day, the generator blew up. Roth replaced it with a new engine, somewhat larger than the first engine, a Toyota model 584. In March 2001 that engine failed. The pistons were full of salt and the seal on the raw water pump was "totally gone." The pump was the same one that had been rebuilt by the plaintiff. Pump seals usually last a year, but they fail "all the time."

26. The plaintiff's invoice for this job (Plaintiff's Exhibit 5), dated July 19, 2000, in the amount of $6,686.20, has never been paid. At some point the plaintiff had told Roth that he could have a few months to get back on his feet before paying the bill.

27. In August, when the plaintiff's bookkeeper discovered the problem with the credit card machine, she called Roth, who told her to call his father for a check. In an earlier conversation, Roth had told her that he was willing to pay "whatever the costs for parts and freight." She tried to call Roth's father several times, and when she finally reached him he expressed dissatisfaction with the time it had taken to complete the overhaul and with the cost. He told her he would talk with his son and get back to her, but he never did.

28. The bookkeeper eventually left a message with Roth that the bill must be paid by a certain date or it would be turned over to the business's credit manager. The bill was not paid by that date. A demand letter was sent to Roth on October 17, 2000 and received by him the next day. Plaintiff's Exhibit 4.

29. The plaintiff has not received any payment for the work done on the engine and pump.

30. Roth was able to use all of his 88 fishing days in 2000. He believes that delay in repair of the engine cost him two lobstering trips, which began after he rerigged the vessel following the fishing season. The average "owner's check" for each such trip is $2,100.

31. Roth testified that the plaintiff "could have charged ten markups if I just got a working engine back."

32. Overcranking a generator's engine can cause the raw water pump's plumbing to fill up with salt water which will flow into the cylinders of the engine that have open valves when the engine is lower than the water exhaust, which is the case with the F/V Lady Maria.

Conclusions of Law

This is an action brought in admiralty alleging breach of a maritime contract. Verified Complaint (Docket No. 1) at 2. Defendant F/V Lady Maria, Inc. filed a counterclaim alleging breach of contract and a warranty of workmanlike performance, deceptive trade practices, breach of implied warranties of fitness for a particular purpose and merchantability, and breach of express warranties of workmanlike performance, merchantability and fitness for a particular purpose. Defendants' Answer, Affirmative Defenses and Counterclaim ("Counterclaim") (Docket No. 11) at 3-6. During telephone conferences on December 5 and 7, 2001, counsel for the defendant stated that his client would pursue only the following claims in its defense and on its counterclaim: (i) that the amount of time taken to complete repairs to the vessel was excessive; (ii) a warranty claim relating to the raw water pump; and (ii) that the prices charged by the plaintiff for parts in connection with the repair were excessive. Report of Conferences of Counsel and Order (Docket No. 30) at 1-2.

Paragraph 21 of Count II in the counterclaim refers to "overpriced parts and equipment." There is no evidence that the plaintiff sold any equipment to the defendant, and I find that the plaintiff's charges to the defendant for the parts used in the repair were not excessive. The plaintiff testified,

without contradiction, that his markup of 35% on the price of parts that he acquired was standard in his industry. The markup on those same parts imposed by Billings when it sold to the plaintiff the parts it had acquired from Alaska Diesel is a standard practice in any American industry; the distributor, wholesaler and retailer each add to the price of an item as it moves along the path to sale to the ultimate consumer. The defendant did not demonstrate that the amount of the markups was unreasonable nor did it provide any legal authority for its argument that the plaintiff had a duty to inform the defendant that two markups in the price of the parts had taken place.[3] Indeed, Roth told the plaintiff's bookkeeper that the defendant was willing to pay "whatever it costs" for the necessary parts and freight[4] and he testified that the plaintiff "could have charged ten markups if I just got a working engine back." He cannot now be heard to claim that the parts cost too much. The plaintiff is entitled to judgment on Count II of the counterclaim.

In closing argument, counsel for the defendant contended that an implied warranty of fitness for a particular purpose exists under the Uniform Commercial Code for the parts added to the raw water pump by the plaintiff during the repair and that this warranty runs from the plaintiff to the defendant rather than from the manufacturer of those parts. There are two problems with this position. First, the only evidence concerning the failure of the raw water pump, some six months after the plaintiff completed work, is that a seal was "totally gone." The defendant offered no evidence that this seal was replaced by the plaintiff during the repair. The only evidence was that the plaintiff ordered a raw water pump repair kit, that the plaintiff's business did repair the pump and that an employee of the plaintiff initially installed the pump upside down after the repair. In addition, the pump seal broke

[3] In his closing argument, counsel for the defendant asserted that the plaintiff's markup of the bill he received from Thurzco for machine shop services in connection with the overhaul was unreasonable and that there was no testimony concerning customary industry practices with respect to markup of costs of services, as opposed to parts. If this issue was properly preserved for trial despite the presence in the final pretrial order of a reference only to markup on the parts, the burden of proof on the counterclaim is on the defendant, who offered no evidence that such a markup was inconsistent with industry practice or unreasonable in any sense other than (*continued on next page*)

down only after the pump had been removed from the engine and installed by someone else on a new and bigger engine that was subsequently purchased by the defendant. It would be pure speculation to conclude that a seal provided by the plaintiff caused this failure. Second, the Uniform Commercial Code does not impose an implied warranty of fitness under the factual circumstances present in this case. The implied warranty of fitness for a particular purpose is applicable only when the purchaser has a particular purpose outside the scope of ordinary purposes and that the seller has reason to know at the time of contracting that the purchaser has that purpose. *Lorfano v. Dura Stone Steps, Inc.*, 569 A.2d 195, 197 (Me. 1990). Assuming *arguendo* that such a warranty applies at all in the circumstances of this case, there is no evidence that the defendant had or told the plaintiff that it had any purpose for the parts used in the repair of the pump or in the overhaul of the engine other than the usual purposes for which such parts are used. The plaintiff is entitled to judgment on any claims for breach of the implied warranty of fitness for a particular purpose included in Count III of the counterclaim.

Count III also alleges breach of an implied warranty of merchantability, although it is not entirely clear whether the warranty is asserted to cover only the parts used by the plaintiff or the entire repair and overhaul of the raw water pump. The plaintiff takes the position that implied warranties are not imposed in the context of repair services as a matter of law. An implied warranty of merchantability is limited to "goods" sold by a seller who is "a merchant with respect to goods of that kind." 11 M.R.S.A. § 2-314(1). The contract in this case was one primarily for services. Plaintiff's Exhibit 9 ("Remove, overhaul and install gen set."); testimony of Roth ("I just wanted a working engine back."); Plaintiff's Exhibit 5 (bill for services of plaintiff, machine shop, and freight exceeds bill for parts). "When as here the transaction involves provision of both goods and services, the

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the defendant's dissatisfaction with it.

question for application of the U.C.C. becomes whether as a factual matter the transaction predominantly relates to goods." *Lucien Bourque, Inc. v. Cronkite*, 557 A.2d 193, 195 (Me. 1989). If the transaction is not predominantly for the sale of goods, the U.C.C., which creates the implied warranties on which the defendant relies, does not apply. *Id*. at 196. *See also Sullivan v. Young Bros. & Co.*, 91 F.3d 242, 254 (1st Cir. 1996) (boat builder not liable for breach of implied warranty of merchantability when defective part installed by boat builder caused plaintiff's damage; builder "sells boats, not [defective part used in building of boat]"). Accordingly, the plaintiff is entitled to judgment on Count III of the counterclaim.

Count I of the counterclaim alleges breach of contract. Here, the first question is what work was agreed to. Roth testified that the problems with the overhauled engine that were apparent at the time of its installation on July 18, 2000 were resolved within a day, that four days into the vessel's first post-overhaul fishing trip the generator shut down due to a faulty electrical board that had caused the engine to break down in the first place, and that the overhauled engine "blew up" in October, 2000 after two more fishing trips. He testified that discovering and replacing the defective electrical board was "part of Casco Bay Diesel's job," but the defendant produced no evidence that investigation of electrical parts was a customary part of overhaul of a marine generator engine, the only written description of the work that was agreed to in this case. There is no evidence that the demise of the engine in October was more likely than not caused by the quality of the work done by the plaintiff. By that time, the faulty electrical board had been replaced. Another marine diesel repair service had looked at the engine and replaced a relay before the electrical board was determined to require replacement. There is no evidence that the installation of the raw water pump upside down, a defect in workmanship remedied by the plaintiff on the day the overhauled engine was installed, caused the

[4] Counsel for the defendants stipulated that Roth had the authority to bind the defendants.

engine to blow up more than two months later. On the evidence presented, I conclude that the plaintiff's work was completed in a reasonably workmanlike manner.

The remaining issue is the competing claims of breach of contract. There can be no question that the defendant corporation breached its contract to pay for the work done by the plaintiff. The defendants apparently contend that the plaintiff breached the contract by charging more than $3,000, taking more than 7 to 10 days to complete the work, and producing an inadequate repair. The only evidence concerning a possible $3,000 contract price or a definite time for performance is Roth's testimony that he asked Galen, an employee of the plaintiff, after he had looked at the engine but before it was taken apart, for a "ballpark figure" on the cost of the repair, and Galen said, "Around $3,000 and seven to ten days." There is no evidence that Galen had any authority to bind the plaintiff or indeed that the plaintiff was ever informed of this conversation. The written authorization for the work signed by Roth has no dollar figure or date for completion. I conclude that the defendant has failed to prove that the plaintiff promised to perform the overhaul and repair for $3,000 or within seven to ten days.

The defendant also argued that the time that passed before the plaintiff completed the work was unreasonable because there were days between June 19 or 20, when the engine arrived at the plaintiff's shop, and July 18,[5] when the engine was reinstalled in the vessel, when the plaintiff did not charge the defendant for any time spent by an employee working on the job. In this regard, I credit the plaintiff's testimony that he did not charge the defendant for the time he himself spent on the job, that it took Billings two or three days to determine what parts were appropriate for the engine involved and to send a parts list and that work was delayed when the rod and main bearings that arrived were the wrong size. The plaintiff's search for the right parts does not appear as time charged on the bill, nor

[5] The evidence, interpreted most generously to the defendant, does not support the allegation in the counterclaim that "[i]t took (*continued on next page*)

could the plaintiff or his employees be working on the engine while the machine shop was working on the crankshaft and block. The plaintiff testified credibly that he was well aware of Roth's desire for a speedy return of the engine to service and that he did all that he could to move the job along. I do not find the total time involved unreasonable under all of the circumstances.

Accordingly, I conclude that the plaintiff is entitled to judgment on all counts of the counterclaim and on his complaint. Damages will be awarded to the plaintiff in the amount of $6,686.20 plus contractual interest at the rate of eighteen per cent per annum from September 27, 2000 and attorney fees, as provided by the contract, in an amount to be determined pursuant to this court's Local Rule 54.2. The parties shall promptly engage in a good faith effort to reach agreement on attorney fees, failing which the plaintiff shall filed a properly supported fee petition by January 23, 2002. The defendant shall respond thereto within ten calendar days of the filing thereof and the plaintiff shall file any reply within five calendar days of the filing of the defendant's response. I will then decide the attorney fee issue. Judgment will enter after that determination is made.

Dated this 17th day of December, 2001.

David M. Cohen
United States Magistrate Judge

GEORGE R CHAMBERLAIN
dba
CASCO BAY DIESEL
plaintiff

STEPHEN M. OUELLETTE, ESQ.

DAVID S. SMITH, ESQ.

CIANCIULLI & OUELLETTE

approximately 7 weeks to perform these repairs." Counterclaim ¶ 4.

163 CABOT STREET
BEVERLY, MA 01915
978/922-9933

v.

LADY MARIA, F/V, In Rem MICHAEL X. SAVASUK
defendant BRADLEY & SAVASUK
MARINE TRADE CENTER, SUITE 303
300 COMMERCIAL STREET
P.O. BOX 267
PORTLAND, ME 04112-0267
(207)773-0788

FISHING VESSEL LADY MARIA INC. MICHAEL X. SAVASUK
defendant (See above)